

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

Second Appeal No.1362 of 2005
With
Civil Application No.1934 of 2005

Shri Dhanaji Tukaram Borade & ors.

Appellants

Vs.

Smt. Hirabai @ Yamunabai Genu Borade
and ors.

Respondents

Mr.Umesh Mankapure for appellants.

Mr.G.R.Agrawal for respondent nos.1 to 3.

CORAM: B.H.MARLAPALLE, J.

June 6, 2007.

P.C.

1. This second appeal arises from the decree dated 23/4/1999 passed by the learned Civil Judge, Junior Division, Nashik Road in RCS No.645 of 1995 and modified by the learned 7th Ad-hoc Additional District Judge at Nashik on 30/6/2005 by dismissing Regular Civil Appeal No.182 of 1999.

2. Deceased Tukaram Borade had six sons and four daughters. The plaintiffs in RCS No.645 of 1995 were the LRs of Genu, the eldest son of Tukaram. Defendant Nos.1 to 5 are the other five sons of

Tukaram and Defendant Nos.6 to 8 and 10 are his daughters whereas defendant no.9 is his widow. Genu died sometimes on 16/8/1986 and Tukaram died on 16/9/1989 at Pimpalgaon Khamb. The plaintiff no.1, the widow of deceased Genu contended that she along with her two minor children i.e. plaintiff nos.2 and 3 was driven out of the house by defendant nos.1 to 5 soon after the demise of Tukaram. As and when she approached the defendant nos.1 to 5 and 10, she was informed that she would not be entitled for any share in the property of Tukaram and, therefore, the plaintiffs filed the suit for declaration and partition of their share as well as possession thereon. The description of the suit property is as under:

A) Agricultural land situated at village

Pimpalgaon Khamb, Taluka, Nashik, Dist. Nashik:

Sr.No.	Gat No.	Area
		H. R

(1)	56/1	2-35
(2)	56/2	0-21
(3)	149/1	0-55
(4)	149/2	0-53

B) Old house property in village Pimpalgaon
Khamb.

C) Old house property in agricultural land.

. The plaintiffs claimed that they had 1/7th share in the suit property and in addition they had 1/7th share in the share of deceased Tukaram. The defendant nos.2 to 10 appeared and filed their written statement at Exhibit 24 and denied the claim of the plaintiffs. At the first instance they stated that the suit property was the self acquired property of deceased Tukaram. By way of amendment they further contended that deceased Tukaram had executed a Will on 5/9/1986 and the same was registered before the Sub-Registrar on 11/9/1986. By the said Will the properties were disposed off in favour of the defendants and no share was given to the plaintiffs and, therefore, they could not claim any share in the suit properties. Plaintiff no.1 entered the witness box in support of the plaintiffs' claim whereas the defendants examined five witnesses viz. Tryambak - DW 1, Santosh Bhatambarkar - DW 2, Gorakh Bhakavade - DW 3, Bhaskar Gowardhane - DW 4 and Vijaysingh Bayas

- DW 5. The plaintiff no.1 in her depositions stated that her husband died on 16/8/1986 and she had issued the notice at Exhibit 43 on 5/4/1990 to the defendants. On the demise of her husband she was staying with her father-in-law and when her father-in-law died the defendants threw her out of house and she became shelterless. Consequently she went to her father along with her children and none of the defendants supported her financially. She also stated that the deceased Tukaram succeeded some ancestral properties and some properties he had acquired under the Bombay Tenancy and Agricultural Lands Act. She, therefore, claimed that the suit properties were ancestral ones and the plaintiffs had undivided share with the other defendants. She also pointed out that on the demise of Tukaram, Defendant no.2 - Dhanaji had become the manager of the joint family. It also came in the evidence that defendant no.1 was working under the Military Engineering Services and the plaintiff no.1 was the second wife of Genu and his first wife had predeceased him.

3. Though the defendants in their written statement claimed that the suit property was self acquired property of Tukaram, they did not bring any

evidence to that effect on record. Knowing fully well that there was nothing to support their claim that the suit property was self acquired property of Tukaram, they amended the written statement vide Exhibit 30 claiming that as per the Will registered on 11/9/1986 i.e. after the demise of Genu, deceased Tukaram had distributed the property among the defendants only and, therefore, the plaintiffs could not claim any share. The trial Court on assessment of the respective evidence adduced by both the parties held that the suit property was a joint family property and the plaintiffs were entitled for the relief of partition and separate possession to the extent of their share. The operative part of the decree passed by the trial Court reads as under:

"2. The plaintiff nos.1 to 3 are entitled to get 9 ps. share + 0.9 ps. share out of suit property. The plaintiff nos.1, 2, 3 each are entitled to partition and separate possession of 2.25 ps. share out of the suit property.

3. The defendant no.9 is entitled to 2.25 ps. + 0.9 ps. share out of suit property.

The defendant nos.1 to 8 and 10 each are entitled to 9 ps. + 0.9 ps. share out of suit property.

4. The partition of the landed property giving Revenue to the Govt. be effected by the Collector or his subordinates in view of the provisions of law relating to prevention of Fragmentation and Consolidation of Holdings Act."

4. The learned Judge of the lower Appellate Court on reassessment of the evidence held that the suit properties were ancestral properties of deceased Tukaram and thus agreed with the findings recorded by the trial Court. The lower Appellate Court further held that the defendant nos.2 to 5 could not prove the execution of the Will dated 5/9/1986 by deceased Tukaram. The Will was at Exhibit 63 and for the first time it surfaced during the pendency of the suit. No effort was made to give effect to the Will so as to change the revenue record in respect of the suit property though it was registered with the Sub Registrar on 11/9/1986. To prove the execution of the Will three witnesses were examined i.e.

Gorakhnath - DW 3, Bhaskar - DW 4 and Vijaysingh Bayas - DW 5. In his evidence Gorakhnath - DW 3 stated that the Will was scribed by Bhaskar - DW 4 in the office of the Sub-Registrar whereas Bhaskar - DW 4 in his depositions stated that he scribed the Will in the office of Advocate Bayas - DW 5 and Gorakhnath was not present at that time. He further stated that he had not accompanied Tukaram Borade to the office of the Sub-Registrar and the witnesses had not put their signatures in his presence. It was under these circumstances that the evidence of DW 3 to DW 5 was found to be inconsistent and it was further noted that the evidence of the attesting witnesses could not be recorded in the trial Court as they were no more. Their death extracts were brought on record in appeal at Exhibits 33 and 34 and none of the witnesses could state the names of the attesting witnesses nor could they identify the signatures of the attesting witnessess. Section 63(c) of the Indian Succession Act, 1925 states that the will shall be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator, or has received from the testator a personal

acknowledgement of his signature or mark. The lower Appellate Court, therefore, referred to the scheme of Sections 68 and 69 of the Evidence Act and recorded a finding that the execution of the will was not proved. This finding cannot be termed as perverse or erroneous.

5. Coming to the shares of the respective sons

and daughters as well as wife of deceased Tukaram, the lower Appellate Court held that Tukaram had six sons and the widow and, therefore, while he was alive the suit property would be divided in eight equal shares. Each of the six sons would get $\frac{1}{8}$ th share and Tukaram and his wife would get $\frac{1}{8}$ th share each. On the demise of Tukaram his $\frac{1}{8}$ th share would be shared by six sons, four daughters and his widow and, therefore, each of the sons would get $\frac{1}{8}$ th share + $\frac{1}{88}$ th share. In this fashion each son and the widow would get $\frac{12}{88}$ th share whereas, daughter would get $\frac{1}{88}$ th share of the suit property. The final decree passed by the lower appellate Court reads as under:

"It is hereby declared the plaintiffs together do have $\frac{12}{88}$ th share in the suit properties whereas the defendant nos.1 to 4 and the

defendant no.9 do have 12/88th share each.
 While the appellant Nos.4a to 4d would get
 12/88th share of their predecessor in interest
 late Subhash (defendant No.5) while the
 defendant Nos.6 to 8 and 10 have 1/88th share
 each in the suit properties."

6. On the issue of the suit property being the
 joint family property and the defendants could not
 prove that it was the self acquired property of
 deceased Tukaram, both the Courts have recorded
 concurrent finding and that being a fact finding
 exercise undertaken on the basis of the evidence
 adduced before the trial Court, no substantial
 question of law arises on the same. The second
 defence taken by the defendants that deceased Tukaram
 had executed the Will at Exhibit 63 and disposed off
 the property to all the defendants to the exclusion
 of the plaintiffs has also been discarded as the
 execution of the Will could not be proved on the
 basis of the evidence of DW 3 to DW 5, though it was
 a registered will.

7. Hence this second appeal does not raise any
 substantial question of law for consideration of this

Court and, therefore, it must fail at the threshold.

8. The appeal is dismissed in limine.

9. Civil Application does not survive and the same stands dismissed.

(B.H.MARL